United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

76 7637

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES D. REICH, APPELLANT

v.

DOW BADISCHE COMPANY, ET AL., APPELLEES

Appeal from the United States District Court
for the Southern District of New York

MEMORANDUM FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

B
P/S

CARIN ANN CLAUSS,
Solicitor of Labor,
DONALD S. SHIRE,
Associate Solicitor,
DENNIS D. CLARK,
PAUL D. BRENNER,
Attorneys,

U.S. Department of Labor,
Washington, D.C. 20210.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-7637

CHARLES D. REICH, APPELLANT

v.

DOW BADISCHE COMPANY, ET AL., APPELLEES

Appeal from the United States District Court
for the Southern District of New York

MEMORANDUM FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The Secretary of Labor submits this memorandum as amicus curiae in support of plaintiff-appellant's petition for rehearing and suggestion for rehearing en banc.

The 2 to 1 panel decision in this appeal involves the proper construction and interpretation of Sections 7(d) and 14(b) of the Age Discrimination in Employment Act (Act or ADEA), 29 U.S.C. §§626(d), 633(b). The Secretary's interest derives from his responsibility for the administration and enforcement of the ADEA. That responsibility includes the filing and prosecution of lawsuits in the

public interest (29 U.S.C. §626(b)). As an alternative to suit by the Secretary, the Act also authorizes private suits by aggrieved individuals (29 U.S.C. §626(c)), such as the instant action. Given the limited resources available for public enforcement, the Secretary is concerned that the effectiveness of the private alternative not be weakened by an improper or unduly onerous construction of the Act's procedural provisions.

The district court dismissed plaintiff's ADEA action on the ground that he failed to timely comply with the notice requirement of Section 7(d) of the Act.

On the appeal, the panel majority[1/] affirmed, holding that the requirement of Section 7(d) can only be satisfied by the filing of a written "notice of intent to sue," and that plaintiff's ADEA suit was therefore barred because his notice to the Secretary was oral, not written. Although that ruling was a sufficient ground upon which to affirm the judgment of the district court, the panel majority went on to hold, in addition, that Section 14(b) creates a procedural requirement under which timely state proceedings must be commenced at least 60 days prior to federal suit, and that plaintiff failed to comply with this additional requirement.

1/ District Judge Dooling, of the Eastern District of New York, and Senior Circuit Judge Danaher, of the District of Columbia Circuit, both sitting by designation.

Chief Judge Feinberg dissented. He concluded that plaintiff's oral notice of intent to bring suit satisfied the requirements of Section 7(d), and that prior resort to state proceedings is optional, not required, under Section 14(b). The Secretary of Labor strongly adheres to the positions adopted by Judge Feinberg.

Thus, there are two issues presently before this Court. First, whether plaintiff's oral notice of intent to bring suit under the ADEA satisfied the requirements of Section 7(d) of the Act. Second, whether Section 14(b) of the Act required plaintiff to resort to an appropriate state agency prior to bringing federal suit, or, rather, whether the purpose of Section 14(b) is merely to give the state time to act if the aggrieved individual chooses to go to the state before bringing federal suit.

I. PLAINTIFF'S ORAL NOTICE OF AN INTENT TO BRING SUIT UNDER THE ADEA SATISFIED THE REQUIREMENT OF SECTION 7(d) OF THE ACT.

At the time this action was filed, Section 7(d) of the Act provided as follows (emphasis added):

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed --

> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 14(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

The precise purpose of the Section 7(d) notice requirement is specified in the legislative history and emphasized by its function in the statutory framework. The legislative reports accompanying Section 7(d) state that the purpose of mandating notice to the Secretary before filing suit was "to allow time for the Secretary to mediate the grievance." S.Rep. No. 723, 90th Cong., 1st Sess., p. 5 (1967); H.R. Rep. No. 805, 90th Cong., 1st Sess., p. 5 (1967).[2/] The statutory framework also reflects that goal; notice triggers the Secretary's statutory responsibility

---

2/ The 1978 amendments to the ADEA, P.L. 95-256, 92 Stat. 189 (April 6, 1978), substitute the requirement that a "charge" be filed with the Secretary instead of a "notice of intent to sue." The Joint Explanatory Statement of the House-Senate Committee states that: "This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department [of Labor] with sufficient information so that it may notify prospective defendnats and to provide the Secretary with an opportunity to eliminate the alleged unlawful practice through informal methods of conciliation." Conf. Rep., H.R. Rep. No. 95-950, 95th Cong., 2d Sess., p. 12 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 1006.

to "promptly notify all persons named therein as prospective defendants in the action and . . . promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." The 180-day time limitation assures that the Secretary will be able to undertake the prescribed mediation efforts before voluntary settlement is inhibited by the hardening of positions and by the accumulation of large claims for back pay. No other action is required in consequence of the prescribed notice to the Secretary and, whether the grievant's notice is written or oral, no prejudice results so long as the persons charged are notified of the claim asserted and the Secretary undertakes the requisite efforts to bring about voluntary settlement.

Here, all of the statutory purposes of Section 7(d) were fully met by plaintiff's oral notice of intent to sue which he provided to the Department within 180 days of his discharge. The Department promptly notified

the employer, undertook an investigation, and attempted to conciliate the matter with the employer on plaintiff's behalf. See slip opin. at 6659-6660. The Secretary had a full opportunity to carry out his conciliation responsibilities under the Act, and the employer had notice of what he needed to know in the event that settlement out of court should fail and suit be initiated by either the private individual or the Secretary. No further benefit would have accrued to either the employer, the Secretary, or the public had the original notice been written instead of oral.

The panel majority held, nevertheless, that this was not enough, despite its agreement that the statutory purposes of the notice requirement are as stated above (see slip opin. at 6664). It held that plaintiff's failure to give the Secretary written notice of his intent to sue, within 180 days of his discharge, barred his subsequent federal suit to redress the alleged age discrimination practiced against him.

However, nothing in Section 7(d) explicitly requires that notice to the Secretary be written, rather than oral, as the panel majority itself recognized (slip opin.

at 6665). To require a lay grievant to initiate his complaint with a degree of formality unnecessary to the statutory purposes would be to elevate form over substance. In a comparable context under Title VII, the Supreme Court declined, in Love v. Pullman Co., 404 U.S. 522 (1972), to require literal compliance where the steps taken fulfilled the legislative objectives of those provisions. To require literal compliance "would serve no purpose other than the creation of an additional procedural technicality" (404 U.S. at 526). "Such technicalities," the Court recognized in Love, "are particularly inappropriate in a statutory sch[illegible] [there, Title VII] in which laymen, unassisted by trained lawyers, initiate the process" (id. at 527).

The strict construction of Section 7(d) adopted by the panel majority is unnecesarily harsh and technical and does not promote the humanitarian purposes of the Act. Nothing in the legislative history or the statutory purpose requires that construction or even supports it, and its rejection would not prejudice the employer in any way. "[T]he fair interpretation of a statute," the Supreme Court has said, "is often 'the art of proliferating a purpose,' * * * revealed more by the demonstrable forces that produced it than by its precise phrasing." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 489 (1951).

Oral notice to the Secretary which in fact is sufficient to initiate his conciliation efforts should be held to satisfy the statutory notice requirement.

II. SECTION 14(b) OF THE ADEA DOES NOT REQUIRE COMMENCEMENT OF STATE PROCEEDINGS PRIOR TO BRINGING FEDERAL SUIT.

Although the question was not reached by the district court, the panel majority held that plaintiff's suit was also barred pursuant to Section 14(b), because he did not timely commence proceedings before a state agency prior to bringing federal suit. That section, in pertinent part, provides as follows (emphasis added):

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act [29 U.S.C. §626] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated.

The issue here is whether Section 14(b) requires resort to an appropriate state agency prior to bringing federal suit or, rather, whether the purpose of Section 14(b) is merely to give the state time to act if the aggrieved individual chooses to go to the state before bringing federal suit.

The panel majority held that Section 14(b) creates a procedural requirement under which proceedings must be commenced prior to federal suit. (Slip opinion at

6667-6670.) In dissent, Judge Feinberg would hold that prior resort to the state is optional, not required. Like the interpretation of Section 7(d) discussed in Part I above, the language itself of Section 14(b) is not clear -- it admits equally of both constructions -- and the legislative history of the 1967 Act is silent.

In addition, there are several recent judicial and legislative developments which strongly support a rehearing on this issue by this Court:

1. Just three days after the panel decision in this case, the Sixth Circuit decided Gabriele v. Chrysler Corp. (No. 76-2265, April 7, 1978), 17 FEP Cases 200. In a detailed analysis, that Court reached a conclusion directly contrary to that of the majority in the instant case.[3/] Like Chief Judge Feinberg, the Sixth Circuit

---

3/ The Gabriele decision has been followed by another panel of the Sixth Circuit in Simpson v. Whirlpool Corp. (No. 76-2195, April 10, 1978). The Secretary of Labor participated as amicus curiae in both of those cases.

"determine[d] that 29 U.S.C. §633(b) does not require prior resort to an available state agency as a prerequisite to an ADEA suit in federal court. Rather, it gives an aggrieved person the option of pursuing state remedies" (17 FEP Cases at 205).[4/]

2. Prior to the panel decision herein, the Third Circuit was the only court of appeals to have ruled directly on this issue. Goger v. H. K. Porter Co., 492 13 (3rd Cir. 1974). In Goger, a panel majority adopted the same result as the panel majority here. Judge Garth, concurring in the result only,[5/] would have adopted the

---

4/ A divided panel of the Eighth Circuit has reached a conclusion in agreement with this Court's panel majority, in Evans v. Oscar Mayer & Co. (No. 77-1692, April 5, 1978), 17 FEP Cases 221. However, the majority there recognized that "[a] definitive answer cannot be found in either the language of the statute, its legislative history, or the policy behind it . . . [S]ubstantial support can be found for either conclusion. Several courts have determined that deference to an appropriate state agency is required by the ADEA, . . . while other courts have held it to be optional" (17 FEP Cases at 222).

The Eighth Circuit ordered defendant to answer the petition for rehearing and suggestion for rehearing en banc filed by plaintiff and supported by the Secretary of Labor as amicus curiae (order of May 10, 1978). The petition is currently pending and we will keep this Court advised of further developments in that case.

5/ For equitable reasons, the plaintiff in Goger was relieved of the effect of the ruling and federal suit was permitted.

interpretation of Section 14(b) urged by plaintiff and the Secretary. In reaching the result in the instant case, this Court's panel majority relied largely on the Third Circuit's ruling (slip opin. at 6669).[6/]

The Third Circuit, however, just recently determined to reconsider its Goger ruling en banc. In Holliday v. Ketchum, MacLeod & Grove, Inc. (No. 77-1867), after oral argument before a panel, during which counsel for the Secretary as amicus curiae urged reconsideration and reversal of the Goger rule, the Third Circuit ordered

---

6/ Goger was subsequently reaffirmed by the Third Circuit in Rogers v. Exxon Research & Eng'r. Co., 550 F.2d 834 (1977), cert. denied, 98 S.Ct. 749, and Bonham v. Dresser Industries, Inc., 569 F.2d 187 (1977). The panel majority also cites Curry v. Continental Arilines, 513 F.2d 691 (C.A. 9, 19[illegible]), and Hadfield v. Mitre Corp., 562 F.2d 84 (C.A. 1, 1977). However, in Curry, the Ninth Circuit held that California had no agency with authority to grant or seek relief under its age discrimination law. While that court assumed -- without discussion or analysis -- that prior resort to the state would otherwise have been required (id. at 692), the issue itself was not before the court. See plaintiff-appellant's brief in Curry (p. 12), where he "concede[d], arguendo, that where there exists substantial relief from the alleged discriminatory act under state law, the state remedy must first be pursued." In Hadfield, the First Circuit explicitly did not reach the issue herein. See 562 F.2d at 88.

rehearing en banc (order of March 14, 1978; en banc hearing held May 11, 1978). Thus, the Goger ruling may well be reversed shortly by the Third Circuit.[7/]

3. On April 6, 1978, the President signed into law the Age Discrimination in Employment Act Amendments of 1978 (Public Law 95-256, 92 Stat. 189). The Joint Explanatory Statement of the House-Senate Committee of Conference states (Conf. Rep., H.R. Rep. No. 95-950, 95th Cong., 2d Sess., p. 12, 1978 U.S. Code Cong. & Admin. News 1006):

> The 300-day limitation and related State deferral procedures are described in more detail in Senate Report 95-493 at pages 5 to 7. The conferees adopt this discussion in the Senate report.

7/ We will keep this Court advised of further developments in Holliday.

The Senate Human Resources Committee Report, referred to in the Joint Explanatory Statement, states in pertinent part (S. Rep. No. 95-493, 95th Cong., 1st Sess., pp. 6-7 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News. 981-982; emphasis added):

> Section 14(b) of the Act . . . requires that if the individual chooses to apply first to the State agency for relief he must give the State the prescribed minimum period in which to take remedial action before he may turn to the federal courts for relief under the ADEA. The provision does not require that the individual go to the State first in every instance.
>
> Several courts have properly recognized the distinction. See e.g., . . . Goger v. H.K. Porter Company, 492 F.2d 13, 17-18 (C.A. 3, 1974) (Garth, J., concurring).
>
> Other courts, however, have ruled that the complainant must go initially to the State authorities in every instance, and that the failure to do so requires dismissal of the federal action. See . . . Goger v. H.K. Porter Co., 492 F.2d 13 (C.A. 3, 1974).

> It is the committee's view that an individual who has been discriminated against because of age is free to proceed either under state law or under federal law. The choice is up to the individual. However, as Section 14(b) makes clear, if the individual does choose to proceed initially under State law, he must give the State agency at least 60 days to take remedial action before he may commence a federal action.

In conclusion, we believe that this Court should reconsider the instant appeal and hold that "the sole congressional purpose underlying the enactment of 29 U.S.C. §633(b) was to give the State time to act on a complaint if an aggrieved individual chooses to proceed there first" (Goger, supra, 492 F.2d at 17-18, Garth, J., concurring; emphasis in the original). "A review of the litigation spawned by §633(b) reveals that this section has proved more successful as a trap to the unwary litigant than as a gesture of respect towards state remedies. It is also evident [from the frequent application of 'equitable relief'] that the federal judiciary has proved extremely reluctant to permit such an obscure technicality, such a token tip of the hat towards federalism, to deprive complainants of the

congressionally intended remedy for age-based discrimination." Bertrand v. Orkin Exterminating Co., 419 F. Supp. 1123, 1129 (N.D. Ill. 1976).

Members of this Court and others have recognized that Section 14(b) can be interpreted in two ways (see e.g., p. 10, n. 4, supra). However, the "Age Discrimination Act is remedial and humanitarian legislation. It is to be construed liberally to achieve its purpose of protecting older employees from discrimination." Moses v. Falstaff Brewing Corp., 525 F.2d 92, 93 (C.A. 8, 1975). That interpretation which assists the intended beneficiaries of the ADEA, therefore, ought to be adopted by our courts. Section 14(b) should be read to apply only if the aggrieved individual chooses to resort to the state prior to bringing an ADEA suit in federal court.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted.[10/]

CARIN ANN CLAUSS,
Solicitor of Labor,

DONALD S. SHIRE,
Associate Solicitor,

DENNIS D. CLARK,
PAUL D. BRENNER,
Attorneys,

U.S. Department of Labor,
Washington, D.C. 20210.

10 / Should this court grant rehearing, the Secretary requests an opportunity to more fully brief his position on the substantive issues involved.

CERTIFICATE OF SERVICE

I certify that copies of this brief were mailed this 15th day of June 1978 to Lewis F. Tesser and Harold M. Weiner, of Coles, Weiner, Tesser, P.C. 1775 Broadway, Suite 404, New York, New York 10019, and to Steven J. Glassman and Mark Landau, of Kays, Scholer, Fierman, Hay & Handler, 425 Park Avenue, New York, New York 10022.

Lois G. Williams